

SERVED: March 24, 1993

NTSB Order No. EA-3831

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of March, 1993

_____)	
JOSEPH DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11384
v.)	
)	
JULIO MIGUEL ANDRADE,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on March 8, 1991, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator finding that respondent violated 14 C.F.R. 91.79(c) and 91.9.² The law judge reduced the suspension

¹The initial decision, an excerpt from the hearing transcript, is attached.

²§ 91.79(c), Minimum safe altitudes; General. (now

of respondent's airman certificate from 120 to 45 days.³ We deny the appeal.

The sole question raised in respondent's appeal is whether the Administrator proved by reliable, probative, and substantial evidence that respondent was the pilot of the low-flying aircraft.⁴ Respondent suggests that the documentation supporting the complaint is inadequate. He argues further that the evidence is unreliable, and may have been altered.

As did the law judge, we find more than adequate evidence to satisfy the Administrator's burden of proof. The Administrator offered extensive circumstantial evidence to make a prima facie

(..continued)
91.119(c)) read:

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.9 (now 91.13) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The Administrator has not appealed.

⁴Respondent also argues that, even if the evidence was interpreted to support a finding that he was the "operator" of the aircraft, this would not establish that he was the pilot in command (PIC), as alleged in the complaint. Nowhere in the complaint does the Administrator allege that respondent was the operator, as that term is used in the regulations. The Administrator alleges instead that respondent was PIC. However, he need not prove that point. Because section 91.79(c) prohibits low flying by any "person," all the Administrator need prove to sustain a finding that respondent violated the rule is that respondent was the pilot of the aircraft at the time.

case, and respondent failed to rebut it with evidence showing he was not the pilot at the time.

Circumstantial evidence may be used in Board proceedings, and is not atypical in aircraft or pilot identification cases. See, e.g., Administrator v. Hodges, NTSB Order EA-3546 (1992). In this case, the circumstantial evidence reliably supported the Administrator's contention that respondent was piloting the aircraft at the time of the incident. Exhibit A-2, the scheduling calendar for various aircraft, showed that respondent was scheduled for the aircraft during the time the incident occurred. Exhibits A-3 and A-4 (the original of A-3) show that respondent was billed for .7 hours of aircraft time on July 4, 1989, the date of the incident.⁵ The flight school's 30-day aircraft log, Exhibit A-5, also shows that respondent, on July 4, 1989, logged .7 hours in the aircraft, and was the only one listed for that date.⁶ With this showing, and when respondent offered no rebuttal, it was reasonable for the law judge to find that respondent was piloting the aircraft at the time of the incident.

⁵There also was testimony that respondent had not disputed the billing. Tr. at 81-82.

⁶Respondent's challenges to these exhibits, suggesting among other things that alterations have been made that make them unreliable, are not convincing. Erasures and other alterations would be expected in such relatively informal documents and could reflect nothing more than human error. There is nothing in the record to support a notion that someone with access to the document would insert respondent's name to implicate him or otherwise alter them to do so.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 45-day suspension of respondent's airman certificate shall begin 30 days from the date of service of this order.⁷

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f). The suspension acts against respondent's current certificate, not the certificate he held at the time of the incident.